Attachment Ten

Testimony Before the House Committee on the Judiciary Task Force to Consider the Possible Impeachment of Judge G. Thomas Porteous, Jr.
December 15, 2009

By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I have been writing and teaching about the Constitution for a quarter century. Among other things, I have written extensively on the specific topic of impeachment. It is a solemn privilege to address this body on the weighty matter before you. In preparation for today's hearing, I have reviewed various materials presented to me by Special Impeachment Counsel Alan I. Baron. Based on these materials and my current understanding of the underlying facts, I believe that the impeachment of Judge G. Thomas Porteous, Jr. is clearly warranted, and I see no valid legal or constitutional objection to impeachment in these circumstances. I have five points to make.

First, there is no good reason to believe—no sound argument from the Constitution's specific text or general structure, no persuasive argument from the history of the Founding, no valid argument grounded in the precedents set by previous impeachment proceedings, no convincing argument from common sense or the American tradition of fair play—that only offenses punishable under the criminal code merit impeachment. As I explained in my 2005 book, *America's Constitution: A Biography*:

> In context, the words "high . . . Misdemeanors" most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal. Under the Articles of Confederation, the states mutually pledged to extradite those charged with any "high misdemeanor," and in that setting the phrase apparently meant only indictable crimes. The Constitution used the phrase in a wholly different context, in which adjudication would occur in a political body lacking general criminal jurisdiction or special criminal-law competence. Early drafts in Philadelphia had provided for impeachment

> in noncriminal cases of "mal-practice or neglect of duty" and more general "corruption." During the ratification process, leading Federalists hypothesized various noncriminal actions that might rise to the level of high misdemeanors warranting impeachment, such as summoning only friendly senators into special session or "giving false information to the Senate." In the First Congress, Madison contended that if a president abused his removal powers by "wanton removal of meritorious officers" he would be "impeachable . . . for such an act of mal-administration."[1] Consistent with these public expositions of the text, House members in the early 1800s impeached a pair of judges for misbehavior on the bench that fell short of criminality. The Senate convicted one (John Pickering) of intoxication and indecency, and acquitted the other (Samuel Chase) of egregious bias and other judicial improprieties.[2]
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> An impeachment standard transcending criminal-law technicalities made good structural sense. A president who ran off on a frolic in the middle of a national crisis demanding his urgent attention might break no criminal law, yet such gross dereliction of duty imperiling the national security and betraying the national trust might well rise to the level of disqualifying misconduct. (Page 200).

Second, and related, the procedural rules applicable in ordinary criminal cases do not necessarily apply to impeachment trials. For example, the Senate, sitting as a trial jury of sorts, need not be unanimous to convict, and the rules for recusal are quite different from those in an ordinary criminal trial. Also, House and Senate members may properly vote to impeach and convict even if in their minds the evidence of guilt does not rise to the level of proof beyond reasonable doubt. For similar reasons, I believe that the Fifth Amendment Self-Incrimination Clause—a clause that applies to ordinary criminal cases—should not apply in all respects to an impeachment trial, which is only quasi-criminal. Thus, reliable derivative fruits of compelled testimony should be admissible in an impeachment trial even if these fruits would ordinarily be barred from an ordinary criminal case; and perhaps even the compelled testimony itself should be admissible, as it would be admissible in a standard civil case. Also, unlike petit jurors in an ordinary criminal case involving a nontestifying defendant, Senators should be allowed to draw

adverse inferences against an impeachment defendant who refuses to answer questions—as may trial jurors in a typical civil case where the defendant declines to take the stand.

The underlying reasoning here is simple. Ordinary criminal cases place the defendant's bodily liberty at risk. Indeed, in a capital case, a defendant's very life hangs in the balance. But an impeachment defendant does not face any threat to life or limb in an impeachment proceeding, even if he is being impeached for treason itself. Thus, impeachment procedures need not be as tenderly protective of defendants because impeachment defendants face fewer punitive sanctions than ordinary criminal defendants. In the case of Judge Porteous, it is not even clear that removal from office would truly "punish" him by depriving him of anything that was ever *rightfully* his. Rather, removal from office would simply undo an ill-gotten gain, by ending a federal judgeship that he never should have received—and never would have received but for the falsehoods and frauds that he perpetrated when being vetted for this position.

Third, it is a gross mistake to believe that federal officers may be impeached only for misconduct committed while in office, or (even more strictly) only for misconduct that they committed in their capacity as federal officers.[3] The text of the Constitution contains no such requirement, and constitutional structure and common sense demonstrate the absurdity of this position. The Constitution explicitly mentions treason and bribery as impeachable offenses. Both offenses can be committed by someone prior to commencing federal office. Indeed, imagine for a moment an officer who procures his very office by bribing his way into it. By definition, the bribery here occurred prior to the commencement of officeholding, but surely this fact should not immunize the briber from impeachment and removal. Had the bribery not occurred, the person would never

have been an officer in the first place. As I put the point in my 2005 book, "In the case of [an officer] who did not take bribes but gave them—paying men to vote for him—the bribery would undermine the very legitimacy of the election that brought him to office."

What is true of bribery is also true of fraud: A person who procures his judgeship by lying to the President and the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.

Fourth, not all evasive or incomplete or even downright false statements in the nomination and confirmation process deserve to be viewed as "high" misdemeanors equivalent to bribery. Here, as elsewhere, judgment is required, and the Congress is perfectly positioned to exercise that judgment. As I explained in 2005: "The House and Senate, comprising America's most distinguished and accountable statesmen, would make the key decisions. Acting under the American people's watchful eye, these leaders would have strong incentives to set the bar at the right level. If they defined virtually anything as a 'high' misdemeanor, they and their friends would likely fail the test, which could one day return to haunt them. If, instead, they ignored plain evidence of gross [executive or judicial] malignance, the apparent political corruption and back-scratching might well disgust the voters, who could register popular outrage at the next election."

In the case of Judge Porteous, as I understand the facts, I would stress that he gave *emphatically false* answers to *direct* (albeit broad) questions; that his emphatic falsehoods concealed *gross* prior *misconduct* as a *judge* in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power; that this nomination-and-confirmation-process fraud and falsehood was part of a *much larger pattern of fraud and falsehood* that began much

earlier (in state court) and continued much later (as evidenced by the frauds and falsehoods he perpetrated on counsel Mole in the *Liljeberg* case); and that had Porteous told the truth in his confirmation process it is *absolutely inconceivable* that he would have been confirmed and commissioned as a federal judge.

Fifth, the House and Senate need not worry in this case about undoing the People's verdict on Election Day—a concern that properly informs presidential impeachment cases. Here, Porteous is a judge because *the Senators themselves* voted to make him one—and they did so under false pretenses. Simply put, he lied to them. This House should give the other body, which voted to place Porteous in a position of power over his fellow citizens, the opportunity to revote and remove Porteous from power now that it is clear that he won the earlier vote by foul, fraud, and falsehood—that is, by high misdemeanor. As I suggested before, removal in this case would not be harsh punishment, but rather would simply be disgorgement of wrongful gain and prevention of foreseeable future misconduct given the gross pattern that has been demonstrated here.

Every day that a fraudster continues to claim the title of a federal judge and to draw his federal salary is an affront to his fellow citizens and taxpayers, to say nothing of the parties unfortunate enough to come before him. The mere fact that criminal prosecution of Porteous might not be warranted should not mean that he should therefore escape the scrutiny and verdict of an impeachment court. I am reminded of the bank robber who managed to fool the judge into acquitting him. "That's great, your honor," the defendant blurted out. "Does this mean I can keep the money?"

Thank you, Mr. Chair.

[1] *Farrand's Records*, 1:88, 230 ; 2:132, 186; *Elliot's Debates*, 3:500 (Madison); 4:126-27 (Iredell); *Annals*, 1:517 (Madison, June 17, 1789).

[2] Although it has been suggested that Judge Pickering was charged with the technical crime of blasphemy, see Raoul Berger, *Impeachment*, 60 n. (summarizing the position taken by attorney Simon Rifkind), the word "blasphemy" nowhere appeared in the articles of impeachment. *Annals*, 13:318-22 (January 4, 1804).

[3] Judge Dennis repeatedly makes this mistake and the mistake is fatal to his entire analysis. See In Re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980 (Dennis, Circuit Judge, joined by Melancon Hartfield and Brady, District Judges, concurring in part and dissenting in part) at 3 (Constitution "requires a showing that the subject judge abused or violated the constitutional judicial power entrusted to him"); id. at 22 ("impeachable high crimes and misdemeanors are limited to abuses or violations of constitutional judicial power").